

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:07-CR-199-FL-1
NO. 5:16-CV-400-FL

ANTWAIN DEVON COUNCIL,)
)
 Petitioner,)
)
 v.)
)
UNITED STATES OF AMERICA,)
)
 Respondent.)


ORDER

This matter is before the court on petitioner's motion to vacate sentence under 28 U.S.C. § 2255 (DE 109), and the government's motion to dismiss, (DE 113). Petitioner asserts a claim pursuant to Johnson v. United States, 135 S.Ct. 2251 (2015), on the basis that his career offender guidelines sentencing enhancement is no longer applicable.

Petitioner's claim is without merit because petitioner was previously sentenced at the bottom of the guideline range that otherwise would be applicable without the career offender guidelines enhancement. In particular, petitioner was resentenced previously on April 3, 2012, to the statutory maximum penalty of 120 months in an amended judgment, where absent the statutory impact, the guideline range would have been 168 to 210 months. (DE 100). If resentenced again without the career offender guidelines enhancement, petitioner would be subject to a total offense level 26, with criminal history category remaining at VI, yielding a guidelines range again of 120 months, where absent the statutory impact the guideline range would be 120 to 150 months. (See Presentence Report DE 65 at 8, 11).

Accordingly, where Johnson has no impact either on petitioner's statutory penalty nor guidelines sentencing range, petitioner's claim based upon Johnson is without merit and must be dismissed. Therefore, the government's motion to dismiss (DE 113) is GRANTED, and petitioner's motion to vacate sentence (DE 109) is DENIED. After reviewing the claims presented on collateral review in light of the applicable standard, a certificate of appealability is DENIED. 28 U.S.C. § 2253(c)(2). The clerk is DIRECTED to close this case.

SO ORDERED, this the 30th day of September, 2016.


LOUISE W. FLANAGAN
United States District Judge